Defamation Online: non-culpable republication

blogs.lse.ac.uk/polis/2010/01/04/defamation-online-non-culpable-republication/

2010-1-4

A Ministry of Justice consultation on defamation and the internet asks whether a single publication rule (SPR) should be introduced for online publications; whether, for this context at least, we should foreswear the *Duke of Brunswick* rule. Such a rule would set a limitation period running from the point of first publication (uploading), rather than from the date of each 'republication' (downloading) of a web page. The consultation paper offers three putatve reforms: straight shift to an SPR; shift to SPR with an extended limitation period (currently, 1 year); or an extension of the statutory version of the qualified privilege defence.

In responding to this consultation, we – Charlie Beckett of Polis, and Andrew Murray and Andrew Scott of the Department of Law at LSE – reject a move towards a single publication rule.

For sure we recognise the problems created for online archivist-publishers by the current multiple publication rule, as exemplified in the experiences of Times Newspapers before the domestic and international courts. However, we would be loathe to see the increased potential for injustice on the part of persons defamed that would be an unavoidable corollary of such a reform. Any reform would have to recognise that not all those who maintain online archives are as deserving of protection as Times Newspapers or other public-spirited media businesses, and that even angels sometimes sup with the devil.

Instead, we propose a new defence of 'non-culpable republication' (the epithet has already been described as "the most graceless phrase to be associated with the internet since user generated content", which we concede!).

Here is a flavour of our proposal. The defence would be available to an archivist-publisher after the elapse of one year from the point of initial publication. To avail of it, the publisher would be required to append a notice to the online article, indicating that a challenge to the accuracy of the piece had been made under the new defence.

The integrity of the archive as a representation of the historical record would be maintained, while any future reader would be left in no doubt that further investigation would be necessary before any imputation could properly be drawn from the article. The force of the alleged libel would therefore be mitigated. Moreover, the inclusion in the notice of a summary of the specific complaints brought – which we recommend – would often add to the discursive value of the original piece. It would remain open to the publisher to withdraw/amend the original piece if they took the view that there was indeed an inaccuracy that should be corrected. At the same time, the publisher would be free to choose not to append the notice, and thereby to assert the accuracy of the original piece. This would allow the publisher to deter attemtps to use the defence willy-nilly, but in such a case they would remain open to suit.

Bearing in mind the importance as we see it of the law supporting the emergence and practice of networked journalism, we also recommend that a variant of the new defence should be available to the author of online statements who loses control of same after uploading (eg where others tranpose statements made, without subsequently checking whether corrections/retractions have been issued).

This post was written by the main author of the paper, LSE Law's Andrew Scott.

Copies of the full response (circa 14 pages), are available here.